Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

No. 92-383

In The

Supreme Court of the United States

October Term, 1992

GREGORY R. GORRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY BRIEF

ALLAN IDES
Counsel of Record for Petitioner
Washington and Lee University
School of Law
Lexington, Virginia 24450
(703) 463-8538

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May the executive branch of the United States government, consistent with the rules of lenity and common law meaning as well as with this Court's decisions in *McNally v. United States* and *Carpenter v. United States*, use the mail fraud statute to create a novel basis for criminal liability between joint owners of property in the absence of any indication that Congress intended to impose such liability?

2. May a federal criminal prosecution in a mail fraud case be premised on routine and innocent mailings of business invoices or checks which occur after completion of the scheme to defraud and on which the success of the scheme does not depend?

3. May a federal court of appeals adjudicating a direct criminal appeal decline to address, without comment or elaboration, a nonfrivolous and dispositive issue properly raised and fully briefed by a criminal defendant?

ARGUMENT

1. In response to Petitioner's argument that absent a showing of congressional intent the mail fraud statute cannot be construed to criminalize the wrongful conduct of a joint owner of partnership property, the government argues that the reach of the mail fraud statute is not limited to crimes under common law and the laws of the states, citing this Court's decision in *Durland v. United States,* 161 U.S. 306 (1896). The government's reliance on *Durland* misses the issue, which is whether Congress intended to impose criminal liability on a joint owner of property. The closest the government comes to addressing the issue is at page 6, n.3, of its brief in opposition, where it states that the language in *McNally* relied upon by Petitioner at Pet. 18 is of no avail because Petitioner's conduct "was forbidden under state law (and under that partnership agreement)." The point is that Petitioner's conduct, the breach of a partner's fiduciary duty under state law and a partnership agreement, are subject only to civil sanctions – an action for an accounting. Without any showing of congressional intent, the government has transformed a civil wrong under state law into a federal felony.

Unlike the defendant in *Durland,* the Petitioner had an ownership interest – as a joint owner – in the property at issue. The law in this country for over two centuries, and in England before that, has been that a joint owner of property has all the legal rights to possession and use that a sole owner of the same property would have, subject only to a later accounting under civil law. The law is NOT that a joint owner has limited property rights or, as the government would have it, no property rights at

all. Simply stated, the law is that a joint owner may do anything with jointly owned property that could be done if the property were solely owned, subject only to a later accounting. Therefore, the law has never criminalized the conduct of a joint owner with respect to his own property, regardless of how deceptive that conduct may be. The mail fraud statute shows no congressional intent to alter Petitioner's property rights.

2. This Court's decision in *Durland* does not negate the doctrine of common law meaning or the rule of lenity in construing the mail fraud statute. The *Durland* decision does not support the government's construction of the mail fraud statute to alter basic tenets of partnership law and criminal law. The amendment of the mail fraud statute to codify the specific holding in *Durland* regarding past or present acts [Act of Mar. 4, 1909, ch. 321, sec. 215, 35 Stat. 1130. *See* S.Doc.No. 68, 57th Cong., 1st Sess., pt. 2, 63-64 (1901)] indicates that Congress did not intend that the executive branch of government use the mail fraud statute as a basis for federal revision of the common law of crimes. The presumption that Congress operates within the commonly accepted definition of legal concepts remains as true today with respect to the mail fraud statute as it was before the *Durland* decision.

The mail fraud statute, as interpreted by this Court in *McNally v. United States*, 483 U.S. 350, 358-60 (1987), and *Carpenter v. United States*, 484 U.S. 19, 27 (1987), applies only to those deceptions involving the "property of another." This term – property of *another* – excludes jointly owned property such as partnership property. *See* Petition for a Writ of Certiorari at 16, n.12. Without any showing of congressional intent, the government has

redefined fraud under the mail fraud statute to apply here, despite the fact that the "property of another" was not involved in the disputed transaction.[1]

3. The government incorrectly asserts that, "Petitioner also challenges the sufficiency of the evidence that the mailings were in furtherance of his fraudulent scheme." Petitioner does not challenge the sufficiency of the evidence. The only evidence regarding how the mailings were related to the alleged "scheme to defraud" was from the government's lead witness who testified that Petitioner's ability to obtain partnership funds was NOT dependent on the routine mailings of invoices and checks relied upon by the government for jurisdiction. *See* Petition for a Writ of Certiorari at 5. Yet the government continues to misstate the evidence by arguing to the contrary: "The ongoing success of that scheme depended on petitioner's replenishing with additional partnership revenues the partnership funds he diverted to HGA Associates." Brief for the United States at 8. The sufficiency of the evidence is not the issue. The issue is the failure of the Fourth Circuit Court of Appeals to address and apply dispositive decisions by this Court, namely *United States v. Maze*, 414 U.S. 395 (1974), *Parr v. United States*, 363 U.S. 370 (1960), and *Kann v. United States*, 323 U.S. 88 (1944), all of which support the proposition that mailings of routine business invoices and checks upon

---

[1] Any doubt about Congressional intent in this regard should have been removed when the mail fraud statute was amended in 1988 to incorporate the term "another," the same limiting phrase interpreted in state criminal statutes to exclude jointly owned property.

which the alleged "scheme to defraud" is not dependent cannot support federal jurisdiction.

4. Nothing in the government's brief refutes this simple point: the current case provides an ideal vehicle for this Court to make a definitive statement about the power of the Executive Branch to interpret and expand the scope of federal criminal laws. If federal criminal laws are to be defined by Congress and not by prosecutorial initiatives, then the present case provides an excellent opportunity to establish that principle.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Date: November 9, 1992

Respectfully submitted,

ALLAN IDES
Counsel of Record for Petitioner
Washington and Lee University
School of Law
Lexington, Virginia 24450
(703) 463-8538